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In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE AMERICAN SHEEP INDUSTRY ASSOCIATION, THE ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, THE ALLIANCE FOR AMERICA, AND THE COALITION OF ARIZONA-NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH IN SUPPORT OF RESPONDENTS

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Mountain States Legal Foundation, The American Sheep Industry Association, The Rocky Mountain Oil and Gas Association, The Alliance for America, and Arizona – New Mexico Coalition of Counties for Stable Economic Growth, respectively, submit this brief *amicus curiae* in support of Respondents Sweet Home Chapter of Communities for a Great Oregon, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.

Amicus, Mountain States Legal Foundation ("MSLF"), is a non-profit, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. Many are engaged in oil and gas, mining, farming, timber harvesting, and ranching activities across the country and operate subject to the oppressive "harm" regulation.

Amicus, The American Sheep Industry Association ("ASIA") is a federation of forty-nine member states and is the national voice of the 110,000 sheep producers in the United States. ASIA was created in 1989 through the merger of the National Wool Growers Association and the American Sheep Producers Council. The history of these

predecessor organizations extends back over 120 years and represents the oldest livestock commodity group in the United States. The purpose of ASIA is to promote the general welfare of the sheep industry.

Amicus, Rocky Mountain Oil and Gas Association ("RMOGA") is a non-profit, trade association whose members account for more than ninety percent of all exploration, production, transportation, refining, and marketing operations occurring in the oil and gas industry within the states of Utah, Wyoming, Colorado, Idaho, North Dakota, South Dakota, Nebraska, and Montana. The exploration and extraction of hydrocarbons by RMOGA's members is essential to meeting the nation's energy needs.

Amicus, Alliance for America ("Alliance"), is a fifty-state network of more than five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and policy interests, including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair.

Amicus, Arizona – New Mexico Coalition of Counties for Stable Economic Growth ("Coalition of Counties"), is an organization representing twenty counties and 736,022 people in the States of Arizona and New Mexico. The

Coalition was formed to protect the physical environment, customs, culture, economic stability and property rights of the citizens of the member counties. Many of the local government members of the Coalition have adopted local land use plans and environmental planning ordinances allowing these governments to assist the federal agencies in making federal land use decisions to protect the physical environment, customs, cultures and property rights of their citizens. Many of the member Counties also have appointed or retained endangered species committees or experts to assist them in reviewing and designing recovery plans to protect endangered and threatened species and private property rights. The Coalition of Counties has an interest in this Court's ruling regarding the definition of "harm" under the ESA because of its effect on local governments throughout America.

As demonstrated herein, the implications of Respondents' case far transcend their individual situations and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws for the ostensible protection of the environment, and in the administration of justice. Similarly, *Amici* believe it is vitally important for this Court to protect individual freedom in the face of increasing civil and criminal enforcement under the Endangered Species Act ("ESA") 16 U.S.C. § 1531-44.

Respondents, like many of *amici curiae*'s members, are engaged in socially valuable work. That is, they provide essential goods and services that improve and maintain the high quality of life we enjoy in this country. However, the FWS' harm regulation makes it unlawful

for a private citizen to use their own land for innocent and otherwise legitimate purposes, such as farming, building a home, or oil and gas exploration, if those uses would modify habitat and inadvertently injure a listed wildlife species. 50 C.F.R. § 17.3. *Amici* believe this extraordinary interference with private property rights is all the more severe because the triggering "injury" under the regulation might be no more than a non-physical injury to "essential behavior patterns." *Id.*

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Amici Curiae hereby adopt Respondents' description of the opinions below, jurisdiction and statutes involved.

STATEMENT OF THE CASE

The Endangered Species Act ("ESA"), codified at 16 U.S.C. §§ 1531-44 (1988), imposes certain duties that are designed to protect species that the U.S. Fish and Wildlife Service ("FWS") has listed as either "endangered" or "threatened."

Respondent's case concerns the legality of the FWS regulations that purport to implement the "take" prohibition imposed by ESA § 9. That statutory provision states, in relevant part:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to – . . .

> (B) take any such species within the United States or the territorial sea of the United States . . .
>
> (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

Id. Any person who "knowingly" takes a listed wildlife species is subject to severe criminal and civil penalties (up to a $50,000 fine and imprisonment for one year for each taking). *Id.* § 1540(a) and (b); *see* 18 U.S.C. §§ 3559, 3571 (raising the maximum penalty to $200,000).

The ESA defines "take" as follows:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Id. § 1532(19). The ESA does not define the component term "harm," but the FWS has promulgated a regulation defining "harm" as:

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including, breeding, feeding, or sheltering.

50 C.F.R. § 17.3. *Amici* believe that this regulation is unlawful.

ARGUMENT

I. THE STRUCTURE OF THE ESA DEMONSTRATES THE CONGRESSIONAL DESIRE TO RESPECT PRIVATE PROPERTY RIGHTS

For the Framers of our Constitution, private property was "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers saw the protection of property rights – rights in land in particular – as "the first object of government." Federalist No. 10, at 78 (Madison) (C. Rossiter ed. 1961). The Takings Clause of the Fifth Amendment lies at the heart of the constitutional scheme to protect such individual rights; its purpose being "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might be forced by the government to give up their property – but only upon payment from the public purse.

The FWS "harm" regulation destroys this careful balance between individual rights and community needs. It often allows a government agency to achieve public goals at the private expense of a single individual. The Takings Clause does not countenance that result. To the contrary, it specifically prohibits government from invading "private right under the pretext of the public good." *United States v. Lynah*, 188 U.S. 445, 470 (1903).

A. THE ESA IS ONLY APPLICABLE TO PRIVATE LANDS THROUGH LAND ACQUISITION

That Congress was aware of the constitutional sanctity of private property rights is apparent in the ESA's legislative history, which consistently repeats two themes: (1) federal land acquisition was Congress' answer to the problem of private land use inadvertently and indirectly injuring listed wildlife by adversely modifying their habitat; and (2) the ESA taking concept only prohibits other more direct and intentionally-caused injuries to listed wildlife.

Senator Tunney, the Senate floor manager for the ESA, made these points succinctly. He described the habitat modification problem and the taking problem as separate problems with separate solutions, just as the Senate Report did (*see* S.Rep. No. 307, *reprinted in* 1973, U.S.C.C.A.N. 2992):

> Many species have been inadvertently *exterminated by negligent destruction of their habitat*. . . . Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the *land acquisition authority* . . . to acquire land for the use of the endangered species programs . . . *Through these land acquisition provisions*, we will be able to conserve habitats necessary to *protect fish and wildlife from further destruction*.
>
> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions of S. 1983 would prohibit

> the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong. Rec. 25669 (July 24, 1973) (emphasis added).

The same approach was adopted on the House side. Rep. Sullivan, the House floor manager and Chairwoman of the House Committee with ESA jurisdiction (Merchant Marine and Fisheries), reiterated that habitat destruction would be addressed through land acquisition, while taking prohibitions addressed other hazards to listed wildlife:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development or resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. . . . H.R. 37 *will meet this problem by providing funds for acquisition of critical habitat* through use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are *understandably unwilling to do so at excessive cost to themselves.*
>
> *Another hazard* to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that Congress can make it less pleasurable for a person to *take* an animal, but we can certainly make it less profitable for them to do so.

119 Cong. Rec. 30162 (Sept. 18, 1973) (emphasis added). This emphatic dichotomy between habitat modifications

and ESA takings persists throughout the remainder of the ESA legislative history.[1]

The major Committee Reports and the statements of the relevant congressional leaders are in agreement that the ESA's answer to the habitat modification problem on private lands was compensatory land acquisition, not prohibition of private land uses in takings. Thus, *Amici* believe that this Court should, of course, require the use of the method that Congress chose to further the ESA's goals. The FWS's "harm" regulation unlawfully subjects private habitat modification actions to a more stringent standard than federal ones. A federal land use action can go forward if it does not result in "destruction or adverse modification" of designated critical habitat, which is defined as an alteration that "appreciably diminishes" the likelihood of "survival" of the *entire* "listed species."[2] In contrast, the "harm" regulation prohibits a private land use action from going forward if it impairs the essential behavioral patterns of even one individual. This stands the legislative scheme on its head, placing the most

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[1] *See also* H.R. Rep. No. 412 at 5 (to solve the problem of "destruction of critical habitat" in the U.S., the government would "acquire" and "set aside" that habitat); 119 Cong. Rec. 25676 (July 24, 1973) (remarks of Sen. Williams); 119 Cong. Rec. 30166 (Sept. 18, 1973) (remarks of Rep. Harrington); 119 Cong. Rec. 42451, 42535 (Dec. 19, 1973) (remarks of Sens. Moss and Stevens).

[2] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. If a federal action meets this standard and the comparable "no jeopardy" standard (*see id.*), it is entitled to an incidental take statement which insulates any described taking from prosecution.

onerous habitat obligations on private entities in derogation of the "federal lead" structure of the ESA.

Amici believe the absence of any statement in the legislative history that taking concepts do include habitat modification actions is far more persuasive as to legislative intent than the absence of the word "exclusive." This Court should not allow a regulatory provision to cause a major change in the law without "at least some discussion in the legislative history." *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992). Insofar as the "harm" regulation includes habitat modification actions, it improperly renders the ESA § 5 (16 U.S.C. § 1534) land acquisition program and ESA § 7 critical habitat provisions insignificant. Instead, *Amici* urge this Court to acknowledge the ESA's compromise with private property rights. Habitat protection on private land is only to occur through ESA § 7 funding and permit controls, where applicable, and otherwise through land acquisition with compensation under ESA § 5.

B. THE DUTY OF CONSERVATION UNDER THE ESA RESTS SOLELY ON THE FEDERAL GOVERNMENT

Under ESA §§ 9(a)(1)(B) and 4(d), private landowners must avoid taking listed species. Private landowners, however, have no duty to manage their lands to assist in the "conservation" or recovery of listed species, as the text of the ESA and the United States' previous position before the United States Court of Appeals for the Ninth Circuit make clear.

Foremost among the aforementioned ESA limitations is the lack of authority to compel private and other non-federal landowners to manage their lands to assist in the "conservation" of listed species. The ESA simply does not provide the FWS such a broad license to establish a federal regulatory program, with severe penalties, to govern private land uses.

Under the ESA's statutory scheme, while federal agencies have "conservation" duties, private landowners do not. Consistent with the federal lead structure of the statute, ESA § 2(b) declares it "the policy of Congress that all *Federal* departments and agencies shall seek to *conserve*" listed species. 16 U.S.C. § 1531(c)(1) (emphasis added). This limited federal duty to conserve is then carried out in two other ESA provisions. ESA § 7(a)(1) requires each federal agency to implement some "programs for the conservation of endangered species and threatened species."[3] ESA § 4(f) also embodies the limited federal duty to conserve by requiring that the Secretary of the Interior prepare recovery plans for listed species.

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[3] 16 U.S.C. § 1536(a)(1). It is improper to read ESA § 7(a)(1) as creating such an all-encompassing federal duty to structure all federal actions to conserve, as the House Committee with ESA jurisdiction stated in rulemaking comments and as the FWS has agreed. *See* 51 Fed. Reg. 19954-55 (June 3, 1986). Instead, ESA § 7(a)(1) at most requires that a federal agency undertake some program to assist in conservation – it can take other actions under ESA § 7(a)(2) (16 U.S.C. § 1536(a)(2)) that avoid jeopardy but that do not advance conservation. *Id.* Only ESA § 7(a)(2) applies to all federal actions and sets the more limited federal duty not to "jeopardize the continued existence of listed species."

16 U.S.C. § 1533(f). Noticeably absent from the ESA definition of "conservation" is any reference to a private landowner's duty to conserve.

Significantly, there is no mention of "conservation" in the ESA § 9 taking concepts or in the regulations defining "harm" and "harass." This omission was intentional. The ESA creates conservation duties only for federal agencies. ESA provisions that apply to private persons and private lands, as well as to federal agencies, do not and cannot include any duty to assist in conservation or recovery. This Court's only previous ESA decision in *TVA v. Hill*, 437 U.S. 153 (1978), does not change the interpretation of the ESA's statutory scheme. In *Hill*, no ESA taking claim was even before this Court. The lower courts had found violations of federal duties under ESA § 7, not ESA § 9 takings. *See Hill v. TVA*, 419 F. Supp. 753, 755 and n.1 (E.D. Tenn. 1976), *aff'd in pertinent part*, 549 F.2d 1064, 1069-70 and notes 13 and 14 (6th Cir. 1977). This Court observed that it was not reviewing the existence of ESA violations, but only whether injunctive relief should issue and whether an implied repeal had occurred. *See* 437 U.S. at 156, 171-72. Thus, this Court expressed no holdings on ESA takings in *TVA v. Hill*.

The FWS has interpreted the ESA and the agency's own regulations in an *amicus* brief the United States submitted to the Ninth Circuit in *Palila v. Hawaii Department of Land and Natural Resources*, 852 F2d 1106 (9th Cir. 1988).[4] The United States filed this *amicus* brief to explain

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[4] The United States' brief explained why neither the ESA nor the implementing "harm" regulation permit using the ESA

why the district court's view (in a private citizen suit not involving the FWS) that an injury to the future recovery

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§ 9 "take" prohibition to advance "conservation" or recovery objectives:

> Imposing a duty under Section 9 to avoid habitat modifications that merely prevent or delay the recovery [*i.e.*, conservation] of an endangered species is not consistent with the overall structure of the Act. Without the significant qualification found in the Secretary's definition [of "harm"] (that habitat degradation must result in injury to the species), persons subject to Section 9 would be required to manage their property in a manner so as to promote the recovery of a listed species.
>
> The statute, however, creates such responsibility with respect to the activities and programs of the agencies of the federal government, and not other owners and managers of property, such as private entities or the states. [The brief then recites the federal duties to conserve in ESA §§ 2(c)(1) and 1536(a)(1), and the ESA § 3(3) definition of "conserve."] There is no reference to this term, however, in Section 9, which sets out the prohibitions, including the ban on takings, applicable to the conduct of all persons subject to the jurisdiction of the United States . . . . This omission is a strong indication that Congress did not intend, through the provision of Section 9, to impose a duty to conserve on such non-federal entities . . . .
>
> To be sure, the over-arching purpose of the entire statute is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be *conserved*, [and] to provide a program for the *conservation* of such endangered species and threatened species * * * ." 16 U.S.C. 1531(b) (emphasis supplied). Reliance on this broad statement of purpose cannot, however, overcome the limitations of the specific language Congress has chosen

rate (*i.e.*, conservation) of a listed species constituted "harm" and, therefore, violated the ESA taking prohibition.

Subsequently, the Ninth Circuit recognized that it must defer to the FWS's interpretation: "We inquire whether the district court's interpretation is consistent with the Secretary's construction of the statute since he is charged with enforcing the Act, and is entitled to deference." *Palila*, 852 F.2d at 1108.

Thus, due to both the structure of the ESA and the expert agency's interpretation adopted in the Government's *Palila amicus* brief, there is no authority for the

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> in Section 9 of the Act. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177-178 (D.C. Cir. 1982). *The responsibility to conserve, as defined in the Act, is specifically directed to federal agencies and activities, and not to the other persons and entities that are subject to the civil and criminal penalties of the Act.* . . . [E]xistence of this specific language in Section 8 [that federal actions must avoid adverse modification of critical habitat] militates strongly against reading into Section 9, applicable to non-federal parties, a similar duty to avoid adverse modifications to habitat that would not necessarily inflict actual injury on the species . . . .
>
> Thus, the Secretary's interpretation of the term "harm" to exclude habitat modification that merely prevent recovery of a listed species accurately reflects Congressional intent as evidenced by the language, structure, and the legislative history of the statute. The district court's suggestion in *dicta* of a broader construction has no such support and therefore is plainly incorrect.

"Brief For the United States As *Amicus Curiae*." (Emphasis added). District Court Docket Entry No. 8, Plaintiff's Exhibit 5 at pp. 12-22.

Clinton Administration to force private landowners to manage their lands to promote the future conservation and recovery of a listed species.[5]

C. HABITAT MODIFICATION ACTIONS WERE PURPOSELY DELETED FROM THE DEFINITION OF "TAKE"

The Senate Committee on Commerce altered the ESA "take" definition to exclude habitat modification. As introduced, § 3(6) of S. 1983 defined "take" to include "destruction, modification, or curtailment of a [listed species'] habitat." *Endangered Species Act of 1973: Hearings on S.1592 and S.1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 54, 127 (1973) ("1973 Senate Hearings"). The Senate deleted the "destruction of habitat" language in the face of testimony from environmental groups that expanding the "take" concept to "include degradation of habitat" was desirable, and indeed necessary to cover an "animal or plant that is killed as a result of habitat destruction." 1973 Senate Hearings at 80, *see id.* at 86, 104, 108, 116.

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[5] Although the federal government cannot compel landowners to assist in the conservation of listed species, landowners may choose to do so voluntarily by preparing habitat conservation plans and seeking incidental take permits under ESA § 10(a). 16 U.S.C. § 1539(a). For a landowner to submit to the conservation standard under ESA § 10(a) is an entirely discretionary, not obligatory, act.

Instead of making habitat modification a "take," the Senate established "an accelerated land acquisition program" as the legislative answer to the habitat modification problem on non-federal lands. S. Rep. No. 307 at 4, *reprinted in* 1973 U.S.C.C.A.N. 2992. The Senate viewed such land acquisition as often "the only means of protecting endangered animals which occur on non-public lands." *Id.* These statements in the Senate Report confirm that the revised "take" definition could not have reached habitat modification actions on private lands. Thus, Congress' deletion of the habitat modification language precludes the FWS from defining takings to include habitat modification actions. Since the "harm" regulation reaches a result that Congress "expressly declined to enact," it is invalid. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 196, 200 (1974).

Amici believe that the Senate's choice maintains the historic exclusion of private land use actions from being wildlife takings and retains the constitutional sanctity of private property rights. It also avoids sensitive issues concerning whether the federal government has the constitutional authority to regulate private land use to protect wildlife. *See Kleppe v. New Mexico*, 426 U.S. 529, 546-47 (1976).

II. THE "HARM" REGULATION DEMONSTRATES THE FWS' PENCHANT FOR OVERREGULATION

Because so many plants and animals are considered "endangered" by the federal government, their whereabouts are not limited to remote national parks, national forests or sparsely populated areas of the West. Instead,

they can be found in every state, on public and private property – even in New York City and Washington, D.C. *See Endangered Species Blueprint*, National Wilderness Institute Vol. 5, 1994. *Amici* wish to underscore to the Court that a "species" for purposes of ESA protection means:

> The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

16 U.S.C. § 1532 (16).

Clearly, the terms "species," "subspecies" and "distinct population" have different meanings. In biology, species and subspecies are not used interchangeably because they are not the same thing. Certainly neither of these terms is the same as the term "distinct population," which has no scientific definition. With an increasing focus on groups below the species level, the FWS contrives to swell the ranks of the federal endangered species program with slight variants of otherwise abundant species. Thus, the "harm" regulation has become a bureaucratically-minted tool for the federal land use management of private property. The tool becomes a convenient means because the subjectivity of determining subspecies and distinct populations allows one to find some plant or animal with which to oppose virtually anything.[6]

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[6] This is demonstrated with a simple hypothetical situation. Eight subspecies of pocket gophers restricted to Utah are currently on the FWS's candidate list. Suppose a county government in Utah has planned some community improvements such

Amici, many of who's individual members have suffered because of this bureaucratic weapon, believe that these types of abuses will certainly hurt true conservation efforts in the long run as the public becomes more skeptical about the "crisis-species-of-the-day," as no conservation program will succeed without the support of the public.

Concern over the FWS's regulatory expansion (and abuse) is growing nationwide with good reason. Why the new quest to regulate enormous areas of private land? A recent General Accounting Office publication sheds light on the FWS' motive – bureaucratic self-preservation:

> a predominate number of the species protected under the Endangered Species Act have the major share of their habitat on nonfederal lands. Specifically, of the 781 species for which the Service was responsible as of May 1993, 712 – over 90 percent – have habitat on nonfederal lands. Of these, . . . 517 have over 60 percent on their total habitat on nonfederal lands.

"Information on Species Protection on Non Federal Lands" General Accounting Office, 1 December 1994.

The national significance of the GAO report, therefore, is heightened by the fact that the "harm" regulation

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as a new elementary school and a reservoir. The projects will adversely affect some pocket gophers. If the pocket gopher, *Thomomys umbrinus*, is considered at the species level it might be determined that the project would affect only 2.5% of all the pocket gophers in Utah. However, if only one of its eight subspecies is monitored, it might appear that the impact is more severe with 20% affected. One case may be considered acceptable while the other may 'jeopardize' the animal's existence.

makes it unlawful for a private citizen to use his or her own land, for innocent and otherwise legitimate purposes, if that use would modify habitat and inadvertently injure a listed wildlife species. 50 C.F.R. § 17.3. That extraordinary interference with private property is all the more offensive because the triggering "injury," under the regulation, need be no more than a non-physical injury to "essential behavioral patterns." *Id.* To the extent that the FWS has sought to convey the impression that its enforcement of the harm regulation never entails the exercise of power over large tracts of land, that impression is false. Many examples abound to the contrary:

> The plan to protect the California gnatcatcher covers 3.8 million acres of both public and private land. *Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher*, 58 Fed. Reg. 65,088 (December 10, 1993).
>
> The FWS claims that as many as 35 million to 42 million acres of land are *necessary* to the survival of the grizzly bear. *Barker, Saving All The Parts* 34 (1993).
>
> FWS has used the "harm" regulation even to the point of preventing modest clearing efforts conducted in the interest of fire prevention in populated areas. *See Determination of Endangered Status for the Delhi Sands Flower-loving Fly*, 58 Fed. Reg. 49, 881,49,884-86 (September 23, 1993) (destruction of species habitat by removal of native vegetation for fire prevention on private land could be interpreted to constitute "take").

In correctly finding that the "take" prohibition in ESA § 9 does not extend to ordinary land use actions that may inadvertently injure listed wildlife, as it would

under the "harm" regulation, Judge Sentelle of the Court of Appeals observed:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife.

Pet. App. 69a.

It is of little wonder then that landowners across the nation have become outraged and adamantly disagree with the FWS' often ludicrous claims that otherwise long-standing uses of their private property could now be charged as "takings" of endangered species.

Worse yet, many like *amicus* MSLF's members Anna M. Klimko, Ishmail Garcia, and Mike Rowe of Winchester, California, nearly paid the ultimate individual price for endangered species "protection." While they fortunately escaped with their lives, their homes were not so fortunate. They had the ill-fortune of being within the FWS' Stephens Kangaroo Rat ("SKR") habitat zone, where severe restrictions were placed on private property owners. In addition to destroying the value of their properties, the FWS strictly prohibited discing five inches into the soil for brush control around their homes to appease the FWS' concerns that these actions would "harm" the Kangaroo Rat. These restrictions subsequently created tremendous brush growth and fuel load. Then the unthinkable happened, the rural residential areas inside the SKR habitat study area ignited. Three days later, the resulting firestorm had burned 25,100 acres and

destroyed twenty-nine homes. Sadly, the FWS ignored the dignity and rights of these individuals in favor of a rodent, which the FWS later determined had moved out of the area because it did not like the resulting density of brush. Such an example illustrates the tremendous power the FWS is wrongly exercising over private property. Congress did not intend such a result. To the contrary, the organization of the ESA reflects an inherent respect for private property. See pp. 6-16 *infra*. *Amici* believe this case demonstrates the danger of bureaucratic power if that power is left unchecked.

III. A DELEGATION DOCTRINE THAT ALLOWS CONGRESS TO ABDICATE ITS POWER TO DEFINE THE SPECIFIC ELEMENTS OF A CRIMINAL OFFENSE, IN FAVOR OF AN UN-ELECTED ADMINISTRATIVE AGENCY, VIOLATES THE SEPARATION OF POWERS

The United States Constitution provides that "[a]ll legislative powers herein shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this provision is derived the anti-delegation doctrine which provides that Congress generally cannot delegate its legislative power to another branch of government.

This Court has consistently reaffirmed and given voice to the central judgment of the Framers of the Constitution that, within our political scheme, the separation of powers into three coordinate Branches is essential to the preservation of liberty. *See Morrison v. Olson*, 487 U.S. 654, 685-696 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986).

James Madison, in writing about the principle of separation of powers, stated: "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist* No. 47, p. 324 (J. Cooke ed. 1961). Further, Madison defended the Constitution against charges that it established insufficiently separate Branches. Separation of Powers, he wrote, "d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted." *The Federalist* No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis added). *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983).

Nonetheless, Congress may permissibly seek assistance, within proper limits, from its coordinate branches. However, before the delegation is made, Congress must first "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform. . . . " *J.W. Hampton, Jr. & Co. v. United States*, 272 U.S. 394, 409 (1928) (emphasis added). In 16 U.S.C. § 1540 (f), Congress delegated rulemaking authority under the ESA to the FWS to make regulations to enforce the Act. Further, in 16 U.S.C. § 1538(a)(1)(g), Congress made it unlawful to violate a FWS regulation made under the ESA.

However, *Amici* believe that this Court should require greater specificity when Congress delegates authority to an agency, such as the FWS, to pass regulations that contemplate criminal sanctions. This issue was

expressly left unresolved by this Court in its most recent delegation case, *Touby v. United States*, 500 U.S. ___, 114 L.Ed.2d 219, 227 (1991).

There can be found no support for the notion that Congress can delegate to the FWS the legislative power to define what acts "harm" endangered species for the purpose of potential criminal liability. *Amici* argue that greater specificity is required in the criminal context because of the heightened risk posed to individual liberty. The "intelligible principle" standard exposes a profound legal paradox in the context of defining criminal laws: the broader, the more "flexible" the legislative grant of power in any given legislation, the less the citizenry is protected from potential discretionary abuse at the hands of administrative officials such as the FWS.

There is no statute that makes it a federal crime to put private property to otherwise lawful use. This Court has stated that "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985).

While civil penalties are inherent within a regulatory scheme, the serious question posed by this case is whether the grant of power to define certain terms for regulatory purposes rises to a power within the FWS to define the elements of a criminal offense. A delegation doctrine that allows Congress to abdicate its power to define the elements of a criminal offense, in favor of an un-elected administrative agency, such as the FWS, does violence to the time honored separation of powers principle. *Amici* urge this Court to confirm the constitutional

rule that only Congress, and not an administrative agency, may define the essential elements of a criminal offense.

IV. THE "HARM" REGULATION CONFLICTS WITH THIS COURT'S PREVIOUS DECISIONS ON STATUTORY INTERPRETATION AND THE RULE OF LENITY

Amici submit that the FWS' "harm" regulation violates statutory construction principles under the principle of statutory construction known as *noscitur a sociis*. This Court has long held that a general term in a statutory list should be interpreted narrowly "to avoid the giving of an unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). The ESA employs the general word "harm" in a list of words with more precise meanings:

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19). Since none of the other "take" terms include private land use or habitat modification actions, neither should "harm."

The Court of Appeals properly reasoned that because "the nine verbs accompanying 'harm' [in the ESA's definition of "take"] all involve a substantially direct application of force," then the term "harm" had been used by Congress in that sense as well. Pet. App. 5a. This Court has recently reiterated that lower federal courts should "not resort to legislative history to cloud a statutory text

that is clear," even when there exist "contrary indications in the statute's legislative history." *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. 655, 662-63 (1994). *Cf. City of Chicago v. Environmental Defense Fund*, 511 U.S. ___, 114 S.Ct. 1588, 1593 (1994) (Scalia, J.) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law").

Similarly, traditional notions of deference to agency expertise in decision-making should have no application to a provision, such as the "harm" regulation, that effectively criminalizes ordinary activities. *Amici* believe that this Court's ruling in *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984) is, therefore, not controlling. Instead, as a number of this Court's recent decisions have so indicated, the rule of lenity should prevail over an agency's contrary view of a statute when such statute contemplates severe criminal or punitive sanctions. *See United States v. Thomson/Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2109-10 (1992) (plurality opinion of Justices Souter, Rehnquist and O'Connor); *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (concurring opinion of Justices Scalia, O'Connor and Kennedy that the rule of lenity prevails over *Chevron* deference to the agency). *See also United States v. X-Citement Video, Inc.*, ___ U.S. ___, 63 U.S.L.W. 4019 (U.S. Nov. 29, 1994).

However, assuming *arguendo* that this penal statute is ambiguous as the FWS says it is, "[t]hen the rule of lenity requires that the construction allowing [Respondents] more liberty rather than less be applied by the courts." *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. 655, 662-63 (1994); *Hughey v. United States*, 459 U.S. 411, 422 (1990). The rule of lenity "demand[s] resolution of ambiguities in

criminal statutes in favor of the defendant." *Ratzlaf*, 114 S.Ct. at 663. This "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Following the rule of lenity is especially important in *malum prohibitum* offense situations such as this case because persons of good conscience may not recognize the wrongfulness of the conduct when they engage in it. For example, *amici* in the course of their lawful and socially productive work harvest timber, till the soil, explore for oil and gas, and put water to beneficial use. However, any of these activities might unknowingly trigger "injury," which, under the regulation, might need no more than a non-physical injury to "essential behavior patterns." 50 C.F.R. § 17.3. *Amici* wish to underscore to the Court the fact that the standard for criminal liability is no different under the ESA than it is for civil liability. Thus, there is no difference between civil and criminal concepts of "harm."

As this Court acknowledged in both *Crandon*, 494 U.S. at 160 and *Ratzlaf*, 114 S.Ct. at 663: "Because construction of a statute must be guided by the need for *fair warning* [to defendants], it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text [of the statute itself]." [Emphasis added.] *See also United States v. Bass*, 404 U.S. 336, 347-50 (1971) ("fair warning" should be given *"in language that the common world will understand"*) (emphasis added).

The majority of the federal environmental statutes criminalize certain conduct by persons within the regulated community. In particular, most of these statutes

target for criminal liability certain conduct that is engaged in "knowingly." Similarly, ESA § 1540(a) and (b) create civil and criminal liability for "knowing" violations of the ESA or FWS regulations. The term "knowing" has been interpreted by the lower courts to require only knowledge of one's actions, not that one was knowingly taking an endangered species. *See United States v. Nguyen*, 916 F.2d 1016, 1018, 1019-20 (5th Cir. 1990) (discussing the ESA amendments of 1978 and the Congressional choice to make criminal violations of the ESA a general, rather than specific, intent crime). *Amici* argue that while Congress might have lowered the *mens rea* requirement in ESA § 9, the FWS regulation reduces the potential culpability to such a low level that no socially productive member of society could not be brought within the governments prosecutorial discretion. The FWS regulation, therefore, flouts the Congressional desire to require a *mens rea* requirement in ESA § 9.

As Blackstone stated: "An unwarrantable act without a vicious will is no crime at all." The vicious will is the *mens rea*. Reduced to its essence, *mens rea* refers to the choice to do a blameworthy act. The requirement of *mens rea* is rationalized on the common sense view of justice that blame and punishment are inappropriate and unjust in the absence of that choice. *Id.*

This Court follows the "familiar proposition that 'existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " *United States v. United States Gypsum Co.*, 438 U.S. 436 (1978). On numerous occasions, this Court has relied upon the words of Justice Jackson in *Morissette v. United States*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' (Footnotes omitted).

342 U.S. 246, 250-251 (1952).

As stated by this Court in *United States v. United States Gypsum Co.*:

> Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality . . . intent *generally remains an indispensable element of a criminal offense.* This is true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

438 U.S. 436, 437 (1987). (Emphasis added.)

This Court's recent decisions in *Ratzlaf* and *X-Citement Video, supra,* directly affect this case because they prescribe the methodology for statutory construction of

the *mens rea* element of ESA § 9. Application of that methodology to the ESA "take" provision mandates that the statutory term be accorded its plain meaning – that awareness of unlawfulness is required – not the agency's vague and overbroad regulation that potentially criminalizes innocent, socially productive activities. *Amici* strongly believe it is fundamentally unfair to subject otherwise legitimate and lawful uses of private property to bureaucratic oversight on the suspicion that citizens might unwittingly be causing non-physical injury to "essential behavioral patterns of endangered species."

CONCLUSION

Amici Curiae respectfully request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia, holding that the FWS regulation in this case is *ultra vires* of the ESA and violative of the constitutional principles discussed herein.

Respectfully submitted,

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